APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; ET AL., PLAINTIFFS,

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS, BFI WASTE SYSTEMS OF MISSISSIPPI LLC; WASTE MANAGEMENT OF MISSISSIPPI INC., PLAINTIFFS-APPELLEES,

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS; COVINGTON COUNTY; JONES COUNTY; PERRY COUNTY; CITY OF PETAL; CITY OF LAUREL; CITY OF HATTIESBURG, MISSISSIPPI; DEFENDANTS-APPELLANTS,

MIKE MOORE, INTERVENOR-DEFENDANT-APPELLANT.

NO. 03-60470.

OCT. 29, 2004.

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

The Mississippi cities and counties that belong to the Pine Belt Regional Solid Waste Management Authority (the Authority) enacted solid waste flow control ordinances requiring that all solid waste collected within those cities and counties be disposed of at facilities owned by the Authority. Plaintiffs-appellees, National Solid Wastes Management Association (NSWMA), BFI Waste Systems of Mississippi, LLC (BFI), and Waste Management of Mississippi, Inc. (Waste Management) (collectively, plaintiffs), filed this suit

against defendants-appellants, the Authority and its member cities and counties, claiming that the flow control ordinances violated the dormant Commerce Clause. Defendants-appellants now timely appeal the judgment, rendered after a bench trial, declaring the flow control ordinance invalid under the dormant Commerce Clause and enjoining their enforcement. We dismiss plaintiffs' complaint in part for want of standing and with respect to the remainder we reverse and render judgment for defendants-appellants.

Facts and Proceedings Below

In 1989 and 1990, several cities and counties in South Mississippi developed a master plan for the management of the solid waste in the region. The goal of the plan was to develop an environmentally-sensitive and cost-effective program for the disposal of the region's solid waste. Among other things, the master plan recommended the creation of a regional solid waste management authority and the construction of a regional landfill. In 1992, the Authority was formed and the plan was adopted. At that time, the Authority was made up of five counties (Covington, Jones, Perry, Forrest, and Lamar) and three cities (Petal, Laurel, and Hattiesburg) in Mississippi (collectively, the Members). By the time this suit was filed, Forrest and Lamar Counties had withdrawn from the Authority.

In 1992, the Authority issued a request for proposals (RFP) to interested parties, including plaintiffs BFI and Waste Management, regarding the regional landfill. Proposals were to be given for two options: 1) to own, design, permit, build, and operate the landfill for thirty years or 2) to equip and operate the landfill for seven years, with the Authority building and owning the landfill. The RFP included an estimated volume of disposable solid waste that would be

generated in the geographic area comprised by the Members[1] and a statement that "[u]pon request, the Authority will require each [Member] ... to adopt and enforce a flow control ordinance in order to assure that the entirety of the ... waste stream generated within the [geographic area comprised by the Members] will be managed and disposed of at the [Authority's landfill]." Five proposals were received, including from BFI and Waste Management. Enviro, a company headquartered in Laurel, Mississippi, submitted the lowest bid for Option 2, but did not submit a bid for Option 1. The Authority analyzed the bids, decided to own the landfill, and began implementation discussions with Enviro prior to actual contract negotiations.

In 1996, the Authority issued revenue bonds to finance the construction of the landfill and three transfer stations.[2] Also in 1996, Enviro signed a contract with the Authority to

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[1] The 1992 RFP estimated the annual volume of disposable waste in the Region to be 153,000 tons. That estimate, however, was derived before Forrest and Lamar Counties withdrew from the Authority. After these two counties withdrew (which was prior to July 2002), the projected volume of waste for the Authority's Region would have been about 129,000-130,000 tons per year.

When creating the master plan and issuing the RFP, the Authority contemplated, at least implicitly, that all solid waste generated within the Region would be disposed of at the landfill that was the subject of the RFP. The Authority's landfill is, and always has been, the only "Subtitle D" landfill within the Region. A Subtitle D landfill is one that is compliant with federal regulations, issued pursuant to Subtitle D of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6941, *et. seq.*, setting the criteria for sanitary landfills.

[2] Waste collecting trucks often unload waste locally at a transfer station until the waste is transported to a landfill for final disposal.

operate the Authority's landfill,[3] located in Perry County and completed in 1997, and transfer stations. The initial term of the contract was for the life of the first landfill cell or seven years, whichever was less, and was to be automatically extended for one-year terms so long as both parties mutually agreed. In 2000, the Authority refinanced the 1996 bonds and issued additional bonds to finance the construction of a second cell at the landfill.

The Authority generates revenue by collecting fees for the disposal of waste at its landfill and transfer stations. Thus the Authority's generation of revenue is based on the amount of garbage that it receives at its facilities. To the extent that the Authority is unable to generate sufficient income to meet its debt payments, the Members are obligated to make up the shortfall.

From the time the landfill opened, the volume of refuse that passed through and to the Authority's facilities was significantly less than the total amount of potential waste generated in the area comprised by its Members. Although the Authority's issuance of bonds was based on a projected volume of 140,000 tons per year, in fiscal year 1998 the landfill's volume had reached only 105,305 tons and in fiscal year 1999, the volume dropped to 96,032 tons. In 1999, in an attempt to increase its trash collection, and therefore its revenue generation, the Authority extended the service area of the landfill to include a total of 22 counties, which allowed the Authority to receive waste at its landfill from the additional counties which were not Members.[4] While the volume

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[3] Enviro provides the labor, management, supplies, equipment, and insurance for the landfill and operates the scales and performs all maintenance at the landfill.

[4] According to its contract with the Authority, Enviro was obligated to bring to the Authority's landfill all the waste it collected within a 75-mile radius of the landfill. The area comprised by the 22 counties roughly corresponds to this 75-mile radius. *The flow*

of trash deposited at the landfill increased with the expanded service area, it reached a high of only 129,017 tons in fiscal year 2000, with the tonnage decreasing thereafter (to 108,625 in 2001 and to 95,205 in 2002).

Due to an insufficient flow of rubbish through and to its facilities, the Authority realized that, at the current volume of waste, it would not be able to make its July 1, 2004 bond payment. Believing that its facilities needed more garbage to remain viable, the Authority adopted a resolution on July 10, 2002, directing its Members to adopt flow control ordinances requiring that all municipal solid waste generated within the then Member counties (Covington, Jones and Perry) and cities (Petral [*sic*], Laurel and Hattiesburg) respectively [collectively, the Region] be transported to its landfill or one of its transfer stations.[5] Each Member enacted identical ordinances, each applicable only within the geographic area of the particular enacting Member, with September 1, 2002, as the effective date.[6] Each ordinance provided that noncompliance therewith would constitute a misdemeanor.

Following the enactment of the ordinances, plaintiffs on August 29, 2002 filed this suit against the Authority and its

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control ordinances, however, apply *only* to the three counties and three cities that are Members of the Authority. When the Authority first created its plan for the landfill, the service area included only the five original member counties (Covington, Jones, Perry, Forrest, and Lamar); the expanded service area added an additional 17 counties.

[5] According to testimony at trial, the amount of trash currently leaving the Region is between 50,000 to 70,0000 tons per year; if this trash were directed to the Authority's landfill, the tonnage disposed of at the landfill would likely be over 140,000, roughly the amount needed to meet the Authority's debt obligations.

[6] The flow control ordinances were subsequently reenacted in September, October, and November of 2002.

Members, seeking declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983.[7] Plaintiffs BFI and Waste Management collect, process, and dispose of commercial and residential solid waste and currently ship the trash they collect within the Region to landfills and transfer stations that they either own and operate or that are owned and operated by affiliated companies. At the time of the suit, solid waste collected by BFI and Waste Management within the Region was and had been eventually transported to landfills outside of the Region, but within Mississippi; none of such waste was (or had been) transported outside of Mississippi (nor did any of it originate as waste outside of Mississippi).[8] The flow control ordinances would require that BFI and Waste Management dispose of waste they collect within the Region only at the Authority's landfill in Perry County.

After the filing of the complaint, the parties agreed that the enforcement of the ordinances would await the outcome of the case. In October 2002, the Mississippi State Attorney General intervened on behalf of Mississippi to defend a potential constitutional challenge to the Mississippi statute pursuant to which the Authority was authorized to direct its Members to enact the flow control ordinances. *See* Miss.Code. Ann. § 17-17-319(2).

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[7] Pine Belt Waste Systems, LLC, also joined with plaintiffs in bringing this suit. Pine Belt Waste, however, was voluntarily dismissed as a plaintiff on November 25, 2002, prior to trial.

[8] Although the Authority's landfill is the only Subtitle D landfill within the Region, *see supra* note 1, the landfills to which BFI and Waste Management currently haul garbage generated within the Region are Subtitle D landfills. BFI currently hauls waste collected within the Region to its landfill in Madison County, Mississippi, and Waste Management hauls its waste to a landfill owned and operated by an affiliated company in Scott County, Mississippi.

Trial was held in December 2002 before the district judge without a jury. After the trial, but before a decision was rendered, Perry County filed a motion to dismiss for lack of jurisdiction based on the "adequate state grounds" doctrine. Also following the trial, the district judge recused himself on his own motion, and the matter was subsequently properly assigned, with consent of the parties, to a magistrate judge for decision. On April 23, 2003, the magistrate judge denied the motion to dismiss and issued findings of fact and conclusions of law and an accompanying judgment, deciding that the ordinances were unconstitutional under the dormant Commerce Clause and enjoining their enforcement.[9] Defendant on May 22, 2003, timely filed their notice of appeal.

Discussion

Defendants contend that the flow control ordinances do not violate the dormant Commerce Clause.[10] We dismiss the

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[9] No damages were awarded. While the judgment purports to generally award "attorneys fees," no amount thereof is stated in the judgment (or in the findings and conclusions) and we are informed by the parties that plaintiffs have in substance waived attorneys fees under this judgment by failing to file any evidence of the amount of attorneys fees or any motion in connection therewith as contmplated in Fed.R.Civ.P. 54(d)(92) and the local rules.

[10] Defendants also contend that the district court lacked jurisdiction because plaintiffs did not appeal the Member counties' and cities' adoption of the ordinances to a state circuit court as authorized by Miss.Code Ann. 11-51-75. *See Benedict v. City of Hattiesburg,* 693 So.2d 377, 380 (Miss.1997); *Falco Lime Inc. v. Mayor & Aldermen of City of Vicksburg,* 836 So.2d 711, 716 (Mis.2002). We reject that contention. The instant suit is one under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against local government ordinances adopted under color of state law on the ground that the ordinances are invalid under and contrary to the United States Constitution. *See Dennis v. Higgins,* 498 U.S.439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991); *National PrivateTruck Council v. Oklahoma Tax Comm'n,* 515 U.S. 582, 115

dormant Commerce Clause claim in part for lack of standing and reverse with respect to the remainder of the claim.

A. Standard of Review

Review of questions of constitutional law is *de novo*. *United States v. Hemmingson,* 157 F.3d 347, 355 (5th Cir.1998). The magistrate judge's findings of fact, however, are reviewed for clear error. *City of New Orleans v. Mun. Admin. Servs., Inc.,* 376 F.3d 501, 506 (5th Cir.2004).

B. Dormant Commerce Clause Analysis

Although the Commerce Clause is an affirmative grant of power to Congress, U.S. CONST. art I, § 8, cl. 3, the Supreme Court has interpreted the clause to contain a negative aspect, the so-called "dormant" Commerce Clause. *Dickerson v. Bailey,* 336 F.3d 388, 395 (5th Cir.2003). The dormant Commerce Clause "'prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* (quoting *Wyoming v. Oklahoma,* 502 U.S. 437, 112 S.Ct. 789, 800, 117 L.Ed.2d 1 (1992)).

We begin our dormant Commerce Clause analysis by asking whether the ordinances "(1) facially discriminate against out-of-state economic interests, or (2) regulate even-handedly and thereby evince only an indirect burden on interstate commerce." *Dickerson,* 336 F.3d at 396. In other words, we ask whether the ordinances "reflect[] a discriminatory purpose or merely a discriminatory effect." *Id.* "Although ... there is no clear line of separation between these

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S.Ct. 2351, 2353-54, 132 L.Ed.2d 509 (1995). "When federal claims are premised on 42 U.S.C. § 1983 ... we have not required exhaustion of state judicial or administrative remedies." *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974). *See also Self-Ins. Inst. of America, Inc. v. Korioth,* 993 F.2d 479, 482 (5th Cir.1993).

two" classifications, "the threshold determination is significant if only because it establishes the constitutional standard of review." *Id.* (internal quotations and citations omitted).

Regarding the first category, "[s]tate laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Id.* (internal quotations and citations omitted). The ordinance will be unconstitutional unless the state actor "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* (internal quotations and citations omitted). "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). "Under this strict scrutiny, ... the state bears the heavy burden to rescue its statutes." *Dickerson,* 336 F.3d at 396 (internal quotations and citations omitted). "This burden is stringent" and the statute at issue is "generally struck down ... without further inquiry." *Id.* (internal quotations and citations omitted).

With the second category–the "evenhanded statutes" that effectuate a legitimate local interest and that only incidentally affect interstate commerce–we apply the "*Pike* balancing test." The statute will be upheld unless the burden it imposes on interstate commerce is "'clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

The magistrate judge struck down the flow control ordinances, finding them to be to be facially discriminatory against interstate commerce. The magistrate judge also determined that the ordinances would not pass the *Pike* test, assuming *arguendo,* as defendants argued, that the ordinances were not facially discriminatory.

C. Plaintiffs' Standing

Before we consider the merits, we must first determine whether plaintiffs BFI and Waste Management have standing to challenge the flow control ordinances.[11] Although defendants have not explicitly raised the issue of standing, we may consider it *sua sponte*. *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003). Our standing analysis consists of constitutional and prudential components.

1. Constitutional Standing

"To meet the constitutional standing requirement, a plaintiff must show (1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir.2001) (citing *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)).

Plaintiffs meet the constitutional, or *Article III*, standing requirements. Because of the flow control ordinances, plaintiffs will not be able to ship the garbage they collect within the Region to the landfills of their choice and, as a result, will be forced to pay a "tipping"[12] fee at the Authority's landfill.

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[11] As a not-for-profit trade association that represents the interests of the private waste services industry and of which BFI and Waste Management are members, plaintiff NSWMA's standing is on this record *entirely* dependent upon whether BFI and Waste Management having standing. *See Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 219 n. 5 (5th Cir.2001) (stating that "organizational standing requires, ... that individuals have standing to sue in their own right"). NSWMA took absolutely no active role in this litigation and has not submitted anything to establish its standing independent of that of BFI and Waste Management.

[12] In garbage parlance, "tipping" is used in place of the less-refined "dumping."

Testimony at trial indicates that plaintiffs' cost to dispose of waste at the Authority's landfill, including the tipping fee and the transportation cost, would be higher than their current cost.[13] Thus, plaintiffs have an injury (higher operating costs) that is traceable to the ordinances enacted by defendants and which would be remedied if we rule that the ordinances are unconstitutional.

2. Prudential Standing

The more difficult question is whether plaintiffs meet the prudential standing requirements. The goal of the prudential standing requirements is to "determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Procter & Gamble,* 242 F.3d at 560 (quoting *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 106 S.Ct. 1326, 1334 n. 8, 89 L.Ed.2d 501 (1986)).

> "These judicially created limits concern whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more

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[13] In addition to a simple comparison of current costs against the costs under the flow control ordinances, other testimony supports plaintiffs' claim of higher costs. The ordinances preclude plaintiffs from operating an "internalized" business--meaning that they collect, transport, and dispose of the waste using their own facilities. Testimony at trial suggests that such a method of operation achieves the best economy of scale for a waste collector. Further, BFI and Waste Management would face a reduced volume of waste at the transfer stations to which they currently haul waste from the Region, because they most likely cannot economically segregate at the transfer station the waste that comes from within the Region from that which comes from outside the Region. The result of the reduced volume at the transfer stations would be an increased operating cost per ton.

> properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties." *Procter & Gamble,* 242 F.3d at 560.

The key inquiry for prudential standing in this case is whether the injury of which plaintiffs complain is "arguably within the zone of interests to be protected" by the dormant Commerce Clause, the "constitutional guarantee in question" here. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). *See also Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 97 S.Ct. 599, 603 n. 3, 50 L.Ed.2d 514 (1977) (applying the zone of interests test in the context of the dormant Commerce Clause). The facts of this case require that we analyze the zone of interest question in two parts: We must determine whether plaintiffs have standing to challenge the flow control ordinances as being facially discriminatory against out-of-state economic interests or whether they can merely challenge the ordinances as being excessively burdensome to interstate commerce.

a. Facially Discriminatory

The two-staged analysis for dormant Commerce Clause claims is instructive as to the relevant zone of interests to be protected. First, with respect to laws that facially discriminate against out-of-state economic interests, the dormant Commerce Clauses [*sic*] seeks to protect against local economic protectionism and retaliation among the states. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 114 S.Ct. 1677, 1682, 128 L.Ed.2d 399 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). In this context, discrimination "simply means

differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994).

We conclude that plaintiffs' injury does not fall within the zone of interests to be protected by the dormant Commerce Clause with respect to ordinances that are alleged to facially discriminate against out-of-state economic interests. The flow control ordinances mandate that any waste generated within the Region be transported to the Authority's landfill or transfer stations. In effect, the ordinances prohibit the export of any waste outside of the Region, including out of state. However, *these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region to any location outside of Mississippi, nor do they ship (and, so far as the record shows, have never shipped) any waste from outside of Mississippi to the Region. Plaintiffs also have not even alleged that they have any plans to do so,[14] and have not suggested that some other party currently ships waste from the Region outside of Mississippi or has plans to do so, or that any out-of-state waste processor receives (or has plans to receive) any of the Region's waste out of state. In sum, plaintiffs' injury is not re-

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[14] Stone County, a Mississippi county that is now within the Authority's expanded service area, *see supra* note 4, has voted to join the Authority, and the Authority has agreed in principle; however, the required ultimate contract between the two had not been finalized by the time of the trial. Waste collected in Stone County by BFI is currently shipped to a landfill in Alabama. As Stone County has not enacted any flow control ordinance and is not a party to this suit (and as none of the here challenged ordinances is applicable to waste collected in Stone County), we will not consider the fact that waste from Stone County is actually shipped out of state.

lated to any out-of-state characteristic of their business.[15] Thus, plaintiffs do not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests.[16] As such, we express

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[15] We also observe that both BFI and Waste Management have their principal place of business in Mississippi. Nothing in the flow control ordinances turns on the principal place of business or the place of incorporation or the citizenship of any generator, disposer or handler of waste (or otherwise).

[16] We note that our conclusion that plaintiffs do not meet the prudential standing requirement differs from that in two opinions from our sister circuits. *See On the Green Apartments LLC v. City of Tacoma,* 241 F.3d 1235 (9th Cir.2001); *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178 (1st Cir.1999). In *On the Green* and *Houlton,* the plaintiffs did not allege that they disposed of their waste out of state or that they had plans to do so. *On the Green,* 241 F.3d at 1241-40; *Houlton,* 175 F.3d at 183. Nevertheless, both the Ninth Circuit and the First Circuit concluded that the plaintiffs met the prudential standing requirements.

We disagree with the analysis in this aspect of *On the Green* and *Houlton.* In *On the Green,* the Ninth Circuit concluded that because the plaintiff alleged only an *intrastate* burden, the "Commerce Clause [was] not at all implicated." *On the Green,* 241 F.3d at 1242. We fail to see how the plaintiff's alleged injury could even arguably fall within the zone of interests to be protected by the dormant Commerce Clause when the court concluded that the case *did not even implicate the Commerce Clause. See id.* at 1242 (Reavley, J., dissenting). Further, the Ninth Circuit seems to have confused the redressability requirement for constitutional standing with the zone of interests test. The Ninth Circuit concluded that the plaintiff's injury was "related to the purposes underlying the Commerce Clause" because the "injury would be *remedied* if [the plaintiff] could take its garbage outside the city." *Id.* at 1241 (emphasis added). The fact that an injury would be remedied if the ordinance was struck down does not mean that the grievance falls within the zone of interests to be protected by the dormant Commerce Clause, particularly when there was no allegation of *any*

no opinion about whether the ordinances would pass the facially discriminatory test if challenged by a proper plaintiff.

b. Burdens Interstate Commerce

We next consider whether plaintiffs nonetheless have standing to challenge the flow control ordinances on the basis of the claim that they excessively burden interstate commerce. We conclude that plaintiffs do meet the zone of interests test in this regard and thus have standing to challenge the ordinances as to their burden on interstate commerce.

The protected against injury is an excessive burden on interstate commerce. An allegation that the plaintiff is involved in interstate commerce and that the *plaintiff's* interstate commerce is burdened by the ordinance in question is sufficient to satisfy the zone of interests test with respect to ordinances that assertedly impose an excessive burden on interstate commerce.

Even though plaintiffs do not ship any garbage collected in the Region out of state, they are engaged in interstate commerce, and *their* interstate commerce is allegedly burdened by the ordinances. A representative of BFI testified at trial that BFI had some contracts that are negotiated on a national

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interstate burden. Under the Ninth Circuit's rationale in *On the Green,* the zone of interest test and the redressability requirement would essentially be the same.

In *Houlton,* the First Circuit concluded that the plaintiff met the zone of interests requirement because the plaintiff had "assert[ed] his own economic interests under the Commerce Clause – a constitutional provision specifically targeted to pro[t]ect those interests." *Houlton,* 175 F.3d at 183. However, the rationale behind the dormant Commerce Clause is to protect against *local economic protectionism at the expense of out-of-state interests, Carbone,* 114 S.Ct. at 1682, not to protect *any economic* interests. In our opinion, the *Houlton* court simply viewed too broadly the zone of interests protected by the dormant Commerce Clause.

or an interstate basis and that such contracts were common. The BFI representative testified that an effect on the Mississippi portion of such a contract would ripple to the portion of the contract in other states.[17] Plaintiffs argue that, because the flow control ordinances will raise their costs to service these national and regional contracts which include customer locations within the Region, they will be relatively less competitive within the Region and that this impact on these contracts will extend to the portion of the contracts covering customer locations outside of Mississippi. The ordinances thus allegedly burden plaintiffs' interstate commerce. Plaintiffs therefore are arguably within the appropriate zone of interests and, therefore, have standing to challenge whether the ordinances excessively burden interstate commerce.[18]

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[17] It is not claimed that anything in the contracts requires that any waste collected within the Region be disposed of outside of the Region. Nor do the ordinances make any requirement that any waste collected outside the Region (though under a contract also covering waste collected within the Region) be disposed of within the Region.

[18] A Waste Management representative gave testimony similar to that given by the BFI representative. He testified that the parent company, Waste Management, Inc., operated in 48 states and that because of the interrelated nature of the business, savings achieved on a transaction in one state would eventually be shared in another stated. Although the representative did not testify that increased *costs* in one area would be similarly shared, we assume arguendo that they would be.

In any event, when one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs. *See Clinton v. City of New York,* 524 U.S. 417, 118 S.Ct. 2091, 2100 n. 19, 141 L.Ed.2d 393 (1998); *Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986). Therefore, because we find that BFI has standing to challenge whether the flow control ordi-

D. Pike Balancing Test

We now turn to the *Pike* balancing test to determine whether the flow control ordinances excessively burden interstate commerce.[19] For this analysis, because plaintiffs do not have standing to challenge the ordinances as facially discriminatory against out-of-state interests, we ignore the fact that the ordinances would not permit them to ship waste generated within the Region out of state.

An "evenhanded" ordinance, *i.e.,* one that does not facially discriminate against out-of-state interests and only incidentally affects interstate commerce, will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits" of the ordinance. *Pike,* 90 S.Ct. at 847. To make this assessment, we consider the nature of the local interest and whether alternative means could achieve that interest with less impact on interstate commerce:

> "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

We first look for a legitimate public purpose that defendants intended to advance by implementing flow control. Defendants indeed have a legitimate local purpose: to ensure the economic viability of their landfill. *See U & I Sanitation*

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nances excessively burden interstate commerce, we need not further analyze Waste Management's independent standing.

[19] Because the magistrate judge alternatively held that the ordinances would not pass even the less rigorous *Pike* test, we need not remand the case for the court below to consider the *Pike* test in the first instance.

v. City of Columbus, 205 F.3d 1063, 1070 (8th Cir.2000) (recognizing economic viability as a legitimate local purpose in the context of a waste flow control ordinance).

Next, we identify the burden imposed on interstate commerce. To succeed in a challenge to a regulation under the *Pike* balancing test, the challenging party must show that the regulation has "a disparate impact on interstate commerce." *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 75 (2d Cir.1998). The "incidental burdens to which *Pike* refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Id.* (internal quotation and citation omitted). "Where a regulation does not have this disparate impact on interstate commerce, then we must conclude that ... [it] has not imposed any incidental burdens on interstate commerce" and, therefore, that it passes the *Pike* test. *Id.* (internal quotation and citation omitted).

The flow control ordinances here do not have a disparate impact on interstate commerce; consequently, plaintiffs fail in their attempt to show that the ordinances do not pass the *Pike* test. The only evidence of an interstate burden is the effect on plaintiffs' interstate contracts: the flow control ordinances, because they will raise plaintiffs' costs within the Region and will make plaintiffs relatively less competitive, impose a burden on plaintiffs' interstate commerce by affecting the portion of plaintiffs' interstate contracts that involve areas beyond Mississippi. The burdens imposed by the ordinances on interstate commerce, however, are no greater than those imposed on *intrastate* commerce. Plaintiffs' contracts that are wholly within Mississippi, and even wholly within the Region itself, will also be affected as plaintiffs' costs increase within the Region and plaintiffs, thereby, become relatively less competitive. In fact, the burden imposed on wholly intrastate contracts, particularly those that are contained wholly within the Region, will likely be *greater* than that imposed by the flow control ordinances on plaintiffs' interstate contracts. The interstate contracts–which are pre-

sumably larger than plaintiffs' contracts that are contained entirely within Mississippi or the Region–will likely be more able to spread the increased costs over a wider base of business than will plaintiffs' smaller contracts. We fail to see how the ordinances will in this respect impose a greater burden on interstate commerce than they will on *intrastate* commerce.

Moreover, so far as they affect BFI and Waste Management, the ordinances do not inhibit the flow of goods (or waste) interstate. *Int'l Truck & Engine Corp. v. Bray,* 372 F.3d 717, 727 (5th Cir.2004) ("A statute imposes a burden when it inhibits the flow of goods interstate."). Furthermore, while the ordinances may have the effect of shifting some business away from plaintiffs, as the ordinances increase their costs and make them relatively less competitive, this result does not mean that the ordinances burden interstate commerce: "[T]he dormant Commerce Clause 'protects the interstate market, not particular interstate firms.'" *Id.* (quoting *Exxon Corp. v. Governor of Md.,* 437 U.S. 117, 98 S.Ct. 2207, 2215, 57 L.Ed.2d 91 (1978)) (stating that the fact that a regulation might cause truck purchasers to turn to other competing truck manufacturers did not burden interstate commerce). If plaintiffs lose some of their interstate contracts because of their higher costs within the Region, the ordinances would not prohibit another garbage collector from entering into a similar interstate contract, whether that garbage collector was from Mississippi or some other state.

Because plaintiffs have not shown that the ordinances disparately impact interstate commerce relative to intrastate commerce, their *Pike* challenge that the ordinances excessively burden interstate commerce fails.

Conclusion

Accordingly, (a) we DISMISS for want of standing plaintiffs' claim with respect to whether the ordinances facially discriminate against interstate commerce or out-of-state interests, and (b) with respect to whether the ordinances otherwise excessively burden interstate commerce, we REVERSE and RENDER judgment for defendants.[20]

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[20] In his opinion the magistrate judge did not reach any conclusion regarding Mississippi Code § 17-17-319(2), the law pursuant to which the Authority directed its Members to enact flow control ordinances, the judgment does not speak to § 17-17-319(2) and the parties do not argue that this court need address its constitutionality. Moreover, as we hold that as to the particular flow control ordinances here the suit must be dismissed for want of standing with respect to whether the ordinances are facially discriminatory against interstate commerce contrary to the dormant Commerce Clause and that those ordinances do not violate the dormant Commerce Clause with respect to whether they otherwise excessively burden interstate commerce compared to their putative local benefits, we need not further address the constitutionality of § 17-17-319.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

NATIONAL SOLID WASTE MANAGEMENT ASSOC., et al., PLAINTIFFS

versus

PINE BELT SOLID WASTE MANAGEMENT AUTHORITY, et al., DEFENDANTS

CIVIL ACTION NO. 2:02CV723Gu

[April 23, 2003]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO FED. R. CIV. P. 52(A)

The question before this Court is whether certain municipal ordinances restricting the disposal of solid waste colleced within a specific geographic area constitutes a vidation of the Commere Clause of the United States Constituton. The plaintiffs, Waste Management of Mississippi, Inc ("Waste Management") and Browning Ferris Waste Systens of Mississippi, LLC ("BFI"), are in the business of collecion and disposal of solid waste. The, defendant, Pine Belt Soid Waste Management Authority ("Authority"), caused its menber governmental entities to enact solid waste flow control ordinances. Pursuant to these flow control ordinances, all solid waste collected within the Authority boundaries must be directed to the Authority landfill and transfer statiois. Plaintiffs filed this action contending that the flow control ordinances discriminate against interstate commence. Defendants counter that these flow control ordinances are vald regulations for the collection and disposal of solid waste. According to defendants, any effect upon interstate commerce is merely incidental and any burden upon interstae commerce is outweighed by the putative local benefits.

FACTS

The facts in this case are largely undisputed.[1] In an effort to address the public necessity for the safe and efficient collection and disposal of solid waste, Mississippi enacted the "Mississippi Regional Solid Waste Management Authority Act."[2] Among other things, the Act permits local governmental bodies to form regional waste management authorities. In 1992, the Pine Belt Regional Waste Management Authority was created. Its local governmental members included the Cities of Hattiesburg, Laurel and Petal, as well as the Counties of Covington, Jones, Perry, and Lamar.[3] The Authority generates revenue by collecting fees for solid waste transfer and disposal at its facilities. In 1996, the Authority issued revenue bonds to finance capital expenditures, land acquisition, construction and maintenance of a regional landfill and three transfer stations. In the event that the Authority was unable to generate sufficient income to meet its bonded indebtedness, the Authority members would be obligated to make up the shortfall. While it is stipulated that the Authority owns the landfill and transfer stations, these facilities are operated under contract by a private entity, to wit: Enviro Inc. ("Enviro"). The Authority expanded its service area in 1999 to include approximately 22 Mississippi counties. Although the membership of the Authority did not change, the expanded service area permits the Authority to increase its income stream by receiving additional solid waste from the municipalities within the expanded area. At this time, the Authority is in the process of completing a fourth transfer station.

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[1] Throughout these findings and conclusions, the critical testimony and exhibits will be discussed. However, all of the evidence has been considered.

[2] MISS. CODE ANN. § 17-17-301 through § 17-17-349.

[3] Lamar County later withdrew from the Authority.

Due primarily to a reduction in the amount of solid waste received at its facilities, the Authority realized that it would be unable to meet its financial obligations in fiscal year 2004. In an effort to increase the volume of solid waste received at its facilities and consequently increase revenue, the Authority decided to direct its members to initiate solid waste flow control ordinances. In July and August of 2002, each member of the Authority enacted identical flow control ordinances which require disposal of all solid waste generated within the geographic boundaries of the Authority at one of its facilities.[4] A violation of the flow control ordinance constitutes a misdemeanor offense punishable by fine and/or imprisonment.

The plaintiffs collect, process and dispose of commercial and residential solid waste throughout Mississippi. In addition, plaintiffs own and operate private landfills and transfer stations. Significantly, plaintiffs have numerous private contracts for the collection and disposal of commercial solid waste within the geographic boundaries of the Authority. As a result of the solid waste flow control ordinances enacted by the Authority members, plaintiffs will be prohibited from disposing of solid waste collected within the Authority boundary at their own facilities or any other public or private facility outside of the Authority. According to plaintiffs, the flow control ordinances will increase their operating costs, place in jeopardy private contracts with commercial solid waste producers, and result in an unfair economic advantage

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[4] The flow control ordinances were subsequently reenacted in September, October and November of 2002. They each provide in part that all "solid waste generated within the geographic boundaries ... that is placed in the waste stream shall be transported to, stored and managed at the Pine Belt Regional Solid Waste Management Authorities landfill in Perry County, Mississippi, or at a transfer station owned by the Pine Belt Regional Solid Waste Management Authority."

for their competitors. Consequently, plaintiffs filed a complaint seeking declaratory, injunctive and monetary relief under 42 U.S.C. § 1983. After the plaintiffs filed their complaint, the parties reached an agreement in which the municipalities would forego enforcement of the flow control ordinances, thus maintaining the status quo pending trial and disposition of this matter on the merits. The matter was tried without a jury. Subsequent to trial, the parties consented to trial and entry of a final judgment by a U.S. Magistrate Judge. The case has been referred pursuant to 28 U.S.C. § 636(c)(1) and by the agreement of the parties has been adjudicated upon the trial record, exhibits and stipulations.

DISCUSSION

The Authority has undertaken an arduous task. Disposal of ever increasing amounts of solid waste has created a national problem that has produced complex environmental, technical and political issues. The Court must determine whether the solid waste flow control ordinances enacted by the defendants affects interstate commerce and if so, whether these flow control ordinances constitute discrimination against interstate commerce or whether they regulate in an evenhanded manner with only incidental effects on interstate commerce which are outweighed by the putative local benefits.

The Dormant Commerce Clause

The United States Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. Although the Commerce Clause is an affirmative grant to Congress, the Commerce Clause has been interpreted by the courts to contain a "negative" aspect. This doctrine, called the "negative" or "dormant" Commerce Clause, is a judicially created limit on a state's power to regulate interstate commerce in the absence of authority from the Congress. It denies the States the power to unjustifiably discriminate against or burden the in-

terstate flow of articles of commerce. *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 98,114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994).

The courts have developed two lines of analysis to determine if a law violates the dormant Commerce Clause. First, the court considers whether the law is facially discriminatory, in its practical effect or purpose. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). Laws that discriminate against interstate commerce are virtually *per se* invalid unless the municipality can demonstrate, under rigorous scrutiny, that the discriminatory law is justified by a valid factor unrelated to economic protectionism and that no nondiscriminatory alternatives exist which will preserve the local interests at stake. *Hynt [sic] v. Wash. State Apple Adver. Comm 'n,* 432 U.S. 333, 353, 97 S. Ct. 2424, 2446, 53 L. Ed. 2d 383 (1977); *see also Chem. Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 342-45,112 S. Ct. 2009, 2013-16,119 L. Ed. 2d 121 (1992). Second, if the law does not discriminate against interstate commerce, the court considers whether the law regulates evenhandedly, having only incidental effects on interstate commerce. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S.137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970). Under *Pike,* the court applies a "balancing test" to determine whether the putative local interests outweigh the burden imposed by the law.

C & A Carbone, Inc. v. Town of Clarkstown

The seminal decision in regard to solid waste flow control ordinances and their impact on the dormant Commerce Clause is *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383,114 S. Ct.1677,128 L. Ed. 2d 399 (1994). In *Car-*

bone, the Town of Clarkstown, New Jersey, wanted to build a transfer station in order to process non-recyclable solid waste. A private contractor agreed to build the facility and run it for five years. During the five year period, the transfer station would be financed by a "tipping fee" collected by the contractor. In addition, the Town of Clarkstown agreed to guarantee a minimum tonnage of solid waste and to pay for any deficiencies between the actual and guaranteed minimum tonnage. Upon expiration of the five-year operating agreement, the contractor agreed to convey the facility to the Town of Clarkstown for one dollar. In an effort to avoid the potential that local taxpayers would be required to pay additional fees to the private operator for solid waste that was never actually delivered, the Town of Clarkstown enacted a flow control ordinance. The flow control ordinance required that all acceptable solid waste generated within the Town of Clarkstown be processed at the new transfer station. C. & A. Carbone, Inc. was cited for violation of the flow control ordinance by exporting solid waste that had been generated within the town's geographic boundaries.

The Supreme Court held that the flow control ordinance enacted by the Town of Clarkstown discriminated against interstate commerce because it permitted only the favored local operator to process waste. The Court reasoned as follows:

> [T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.
>
> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition ... .

> . . . The essential vice in laws of this sort is that they bar the import of the processing service .... Put another way, the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it.
>
> The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

Carbone, 511 U.S. at 391-92 (citations omitted). Applying strict scrutiny, the Court further held that the discriminatory flow control ordinance was *per se* invalid since the town could have protected its local interests through nondiscriminatory alternatives. In so holding, the Court reasoned as follows:

> The flow control ordinance does serve a central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years. In other words, as the most candid of *amici* and even Clarkstown admit, the flow control ordinance is a financing measure. By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce ....
>
> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Carbone, 511 U.S. at 393-94 (citations omitted).

The Public/Private Distinction

In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001) *cert. denied* 534 U.S. 1082 (2002), the district court, applying *Carbone*, held that the counties' flow control laws discriminated against interstate commerce in favor of the authority's designated facilities. The Second Circuit reversed. It found the facts in *Carbone* were distinguishable in that the Clarkstown transfer station was owned by a private contractor while the counties' transfers stations were publicly owned. The court held that:

> [A] flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations . . ., which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.

United Haulers, 261 F.3d at 263.[5] The case was remanded to the district court for a determination of whether the counties' flow control ordinances passed constitutional muster under the *Pike* balancing test.

The majority in *Carbone* did not draw a distinction between publicly and privately owned facilities for purposes of its analysis of the Clarkstown flow control ordinance under the dormant Commerce Clause. Neither has the Fifth Circuit had an occasion to consider the issue. Nonetheless, defen-

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[5] *See also East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F. Supp. 2d 1259 (S.D. Fla. 2002) (recognizing the distinction between public and private ownership and applying the *Pike* test).

dants invite the Court to embrace the public/private distinction in *United Haulers* and evaluate their flow control ordinances under the less demanding *Pike* test. In the absence of clear and binding precedent supporting the public/private distinction in evaluating the impact of defendants' flow control ordinances on interstate commerce, the majority opinion in *Carbone* controls. It is the opinion of this Court, that the July 2002 flow control ordinances enacted by the Authority, like the flow control ordinance in *Carbone,* discriminate against interstate commerce. The Authority has drawn a ring around itself. Solid waste collected within that ring must be processed at its preferred transfer stations and landfill. These flow control ordinances prevent everyone except the favored local operator from processing solid waste collected within its boundaries and deprives outside access to the local waste disposal market. Consequently, these flow control ordinances hoard "solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone,* 511 U.S. at 392. It is also the opinion of this Court that the defendants have failed to demonstrate that they had no other means to advance their admitted objective: the generation of adequate revenue to meet their financial obligations. In fact, the trial evidence showed that defendants could have promoted financial viability through increases in taxes, through the imposition of franchise fees[6] or by increasing the amount of solid waste processed at its facilities by accepting solid waste from municipalities outside of the Authority. Thus, like the flow control ordinance in *Carbone,* these flow control ordinances are *pre se* [*sic*] invalid.

Moreover, while the parties have stipulated that the Authority *owns* the landfill and transfer stations, the relationship

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[6] During trial, the Authority admitted that an alternative means of generating revenue was the collection of a "franchise fee" granting private solid waste collectors a license to collect solid waste within the Authority's geographic boundaries.

between the Authority and Enviro (the contract operator) makes it difficult to characterize the Authority landfill and transfer stations as a purely public endeavor. *In United Haulers,* the waste management authority owned *and* operated all of its facilities save one transfer station. *United Haulers*, 261 F.3d at 250. The court was also careful to point out that the "current out-sourcing of the transfer station's operation is a temporary measure." *United Haulers,* at 251. In contrast, the Authority has given no indication that it intends to assume the operation of its facilities or that the current system of private operation of its facilities is other than permanent. Enviro's contract with the Authority essentially gives Enviro complete control over the operation and maintenance of the landfill and transfer stations. Enviro provides all of the equipment and personnel. It controls access to the facilities, and operates and maintains the weight scales and records. While the operating contract does not guarantee a minimum amount of solid waste, payments to Enviro are based upon the amount of solid waste delivered to each facility. Defendants' flow control ordinances not only increase the amount of solid waste processed at its facilities, but they insure Enviro an increased stream of solid waste and the ultimate revenue that it generates. When these factors are considered in combination with the fact that Enviro is also in the solid waste collection and disposal business and that its primary competitors are plaintiffs, the economic advantages associated with the flow control ordinances cannot be categorized as purely public. In sum, the nature of the relationship between the Authority and Enviro is clearly distinguishable from the *United Haulers* case.

Finally, this Court notes that defendants' reliance on the *Pike* balancing test to vindicate these flow control ordinances is misplaced. Assuming arguendo that defendants are entitled to rely on the public/private distinction announced in *United Haulers* and that the *Pike* balancing test applies, under the facts in this case, the flow control ordinances would fail to

pass constitutional muster. The concurring opinion in *Carbone is* instructive. Justice O'Connor reasoned that the Town of Clarkstown's ordinance did not discriminate against interstate commerce. *Carbone*, 511 U.S. at 404-05 (O'Connor, J., concurring). However, applying the *Pike* test, Justice O'Connor determined that Clarkstown's flow control ordinance imposed an excessive burden in relation to the putative local benefits. Justice O'Connor concluded:

> That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. . . . Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S., at 142, 90 S.Ct., at 847. Judged against these standards, Local Law 9 fails.
>
> The local interest in proper disposal of waste is obviously significant. But this interest could be achieved by simply requiring that all waste disposed of in the town be properly processed *somewhere.* For example, the town could ensure proper processing by setting specific standards with which all town processors must comply.
>
> In fact, however, the town's purpose is narrower than merely ensuring proper disposal. Local Law 9 is intended to ensure the financial viability of the transfer facility. I agree with the majority that this purpose can be achieved by other means that would have a less dramatic impact on the flow of goods. For example, the town could finance the project by imposing taxes, by issuing municipal

> bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities. But by requiring that all waste be processed at the town's facility, the ordinance "squelches competition in the waste-processing service altogether, leaving no room for investment from outside."

Carbone, at 405-07 (O'Connor, J., concurring) (citations omitted).

Likewise, defendants' solid waste flow control ordinances were enacted out of the need to generate additional income in order to meet future financial obligations. The Court recognizes that the Authority's need to generate sufficient income to maintain economic viability constitutes a legitimate public purpose, but it is not a permissible basis for interference with interstate commerce. As noted by the Court in *Carbone*, "[b]y itself, . . . revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone*, at 393. As noted above, the Authority could have undertaken alternative steps to insure its economic interests without resorting to solid waste flow control. In addition, defendants introduced no evidence at trial which tended to demonstrate that environmental or public health concerns were the motivating force behind enactment of these flow control ordinances. Thus, even under the less rigorous *Pike* test, defendants' solid waste flow control ordinances fail.

CONCLUSION

It is the opinion of the Court that the solid waste flow control ordinances enacted by the members of the Pine Belt Regional Waste Management Authority affect interstate commerce. It is also the opinion of the Court that these flow control ordinances, like the flow control ordinance in *Carbone,* discriminate against interstate commerce and are *pre se [sic]* invalid. It is also the opinion of the Court that the de-

fendants have failed to demonstrate that they had no other means to advance the local governmental interest.

IT IS THEREFORE ORDERED AND ADJUDGED, that plaintiffs are entitled to Declaratory Relief as stated herein above and that plaintiffs are entitled to a permanent injunction prohibiting the enforcement of the solid waste flow control ordinances enacted by the defendants in July and August of 2002 and subsequently reenacted in September, October and November of 2002.

IT IS FURTHER ORDERED AND ADJUDGED, that all further relief should be, and is hereby denied. The Court shall enter a separate judgement pursuant to Fed. R. Civ. P. 58.

SO ORDERED AND ADJUDGED, this the 23rd day of April, 2003.

[s]
LOUIS GUIROLA, JR.
U.S. MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 03-60470

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; ET AL

Plaintiffs

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; BFI WASTE SYSTEMS, BFI Waste systems of Mississippi LLC; WASTE MANAGEMENT OF MISSISSIPPI INC

Plaintiffs – Appellees

v.

PINE BELT REGIONAL SOLID WASTE MANAGEMENT AUTHORITY AND ITS BOARD OF COMMISSIONERS; COVINGTON COUNTY; JONES COUNTY; PERRY COUNTY, CITY OF PETAL; CITY OF LAUREL; CITY OF HATTIESBURG, MISSISSIPPI

Defendants – Appellants

MIKE MOORE

Intervenor-Defendant-Appellant

Appeals from the United States District Court for the Southern District of Mississippi, Hattiesburg

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ON PETITIONS FOR REHEARING EN BANC

(Opinion 10/29/04, 5 Cir., ____, ____ F.3d ____)

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[s]_____
United States Circuit Judge